Supreme Court, U.S.
FILED

JAN 22 2003

(1)

No. 02-1224

IN THE

# Supreme Court of the United States

ESTATE OF VICTOR WOSKOB,

*Petitioner,*

*v.*

LEAH BETH WOSKOB,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## Questions Presented

1. The provisions of the Uniform Partnership Act, adopted in Pennsylvania and 26 other States, provide that a general partnership shall be dissolved (although not terminated) when a general partner files a petition in bankruptcy. In June 1997, Victor Woskob was a general partner of the Woskob Legends Partnership (the "Partnership") when he filed a petition under Chapter 11 of the Bankruptcy Code. The district court held that Victor Woskob's bankruptcy filing dissolved the Partnership. The Third Circuit reversed the district court and held that 11 U.S.C. § 365(e) pre-empted and over-ruled State law, contrary to the rulings by the Fourth and Fifth Circuit. Did the Third Circuit correctly interpret and apply Section 365(e) or, on the contrary, was the opposite conclusion reached by the Fourth and Fifth Circuits correct?

2. Under the Uniform Partnership Act, as it has been applied in Pennsylvania and other States, a partnership may also be dissolved in a number of ways, including by the expressed intention of a partner, by the overt acts of a partner, and by Court decree. The district court applied the Uniform Partnership Act to hold that the acts of the two general partners of the Partnership (husband and wife), in serially excluding each other from participation in the management and operation of the Partnership, after the institution of bitter divorce proceedings in 1997, caused a dissolution of the Partnership at that time. Contrary to controlling decisions of the Pennsylvania courts as well as courts in other States applying the Uniform Partnership Act, including the First Circuit, the Third Circuit reversed the district court and held that the Partnership could be dissolved only by a court decree. It also held that the date of dissolution of the Partnership would be the date such a decree was entered. Should the Third Circuit's erroneous interpretation of the Uniform Partnership Act be permitted to stand as a misstatement of the law in Pennsylvania and the other States that have adopted the Uniform Partnership Act, contrary to the holding of the Pennsylvania courts?

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## Petition for Writ of Certiorari

The Estate of Victor Woskob prays the Courts to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on September 20, 2002, in order to resolve the conflicts between the Third Circuit and (1) the Fourth and Fifth Circuits on the interplay between State partnership law and federal bankruptcy law and (2) the First Circuit, the Pennsylvania Supreme Court and virtually all State courts on the proper interpretation and application of the Uniform Partnership Act.

## Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit that gives rise to this petition is published at 305 F.3d 177. It is reprinted in Appendix A hereto ("App. A") at page 1a. By order filed November 1, 2002, the Third Circuit denied the petition for rehearing and rehearing en banc. App. B., at page 20a.

## Jurisdiction

On June 14, 2000, the United States Bankruptcy Court for the Middle District of Pennsylvania issued a memorandum decision finding that the Woskob Legends Partnership (the "Partnership") had not been dissolved by the bankruptcy of Victor Woskob filed in June 1997 or by the acts of its partners, Petitioner and Respondent respectively, in 1997, in serially excluding each other from participation in the affairs of the Partnership. App. C., at page 22a. Petitioner timely filed its notice of appeal on June 21, 2000.

On February 6, 2001, the United States District Court for the Middle District of Pennsylvania reversed the Bankruptcy Court and held that Victor's bankruptcy filing and the acts of the partners had dissolved the Partnership in 1997. App. D., at page 39a. Respondent timely filed her notice of appeal on February 20, 2001.

On September 20, 2002, a two judge panel[1] of the Third Circuit reversed the district court. On November 1, 2002, the Third Circuit denied the Estate's timely filed motion for rehearing and rehearing en banc.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

1. Judge Mansman, who heard the oral argument, died before the decision and no judge was assigned to the case in her stead.

## Statutes Involved in this Case

**11 U.S.C. § 365(e)(1) and (2) provides as follows:**

(e)(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on –

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if –

(A)(i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(ii) Such party does not consent to such assumption or assignment; or

(B) such contract is a contract to make a loan, or extend other debt financing or financial accommodation, to or for the benefit of the debtor, or to issue a security of the debtor.

**15 Pa. Cons. Stat. Ann. § 8351 provides as follows: "Dissolution" defined**

The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on, as distinguished from the winding up, of the business.

**15 Pa. Cons. Stat. Ann. § 8352 provides as follows: Partnership continued for winding up affairs**

On dissolution, the partnership is not terminated but continues until the winding up of partnership affairs is completed.

**15 Pa. Cons. Stat. Ann. § 8353 provides as follows: Causes of dissolution**

Dissolution is caused:

(1) Without violation of the agreement between the partners:

(i) By the termination of the definite term or particular undertaking specified in the agreement.

(ii) By the express will of any partner when no definite term or particular undertaking is specified.

(iii) By the express will of all the partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking.

(iv) By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners.

(2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time.

(3) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership.

(4) By the death of any partner.

(5) By the bankruptcy of any partner or the partnership.

(6) By decree of court under section 8354 (relating to dissolution by decree of court).

**15 Pa. Cons. Stat. Ann. § 8354(a) provides as follows: Dissolution by decree of court**

(a) **General rule.** – On application by or for a partner, the court shall decree a dissolution whenever:

(1) A partner has been declared a lunatic in any judicial proceeding or is shown to be of unsound mind.

(2) A partner becomes in any other way incapable of performing his part of the partnership contract.

(3) A partner has been guilty of such conduct as tends to affect prejudically the carrying on of the business.

(4) A partner willfully or persistently commits a breach of the partnership agreement or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him.

(5) The business of the partnership can only be carried on at a loss.

(6) Other circumstances render a dissolution equitable.

## Statement of the Case

The district court held that a partnership is dissolved under the Uniform Partnership Act by both (a) a general partner's filing of bankruptcy and (b) a general partner's wrongful exclusion of the only other general partner from participation in the management, operation and financial rewards of a partnership. The Third Circuit vacated and remanded, holding that neither a bankruptcy filing of one of the partners, nor the wrongful exclusion of another partner, can dissolve a partnership in the absence of a court decree of dissolution.

At issue in this case are whether the bankruptcy court trumps State law, and when a dissolution of a general partnership occurs as a matter of law. In this case, a husband ("Victor") and wife ("Leah") were the sole general partners of the Woskob Legend Partnership ("WLP" or the "Partnership"), a Pennsylvania general partnership formed in 1996. WLP had constructed and was operating a very profitable 42 unit apartment building in State College, Pennsylvania. Other than owning and operating the Legend Apartments (the "Legend"), WLP had no other business. Victor's parents, who had constructed and operated over 400 apartments in the State College area, contributed the construction expertise and funds necessary for their son and daughter-in-law to establish their apartment business through WLP. Record on Appeal ("App.") II at 129, 135; 94-95; 330.

In January 1997, Leah and Victor's marriage came to a bitter end. Leah excluded Victor from the marital home and began divorce proceedings in the Court of Common Pleas of Centre County, Pennsylvania. App. II at 100 and 340. The divorce proceedings not only affected their marriage bonds, but also their business relationship in connection with, *inter alia*, the Partnership. Victor reacted to Leah's actions against him by immediately taking sole control of the WLP and barring Leah from any involvement in the management and operation of the Partnership. App. II

102, 105-06. Leah then secured an order from the divorce court giving her the exclusive right to manage and derive income from WLP. She then took sole control over the Partnership on June 20, 1997. App. II at 103, 104, 344-45, 354-55. Prior to June 20, 1997, Victor excluded Leah entirely from managing the WLP or any of their other joint business affairs. App. II 103. After Leah assumed exclusive control of the WLP on June 20, 1997, she excluded Victor entirely and took more than $360,000.00 from the Partnership up to the time of the district court's ruling in February 2001. App. II 143-44. Leah distributed no money from the Legend to Victor (or later, to his Estate) from the time she took control in 1997. App. II at 144.

In June 1997, Victor filed a bankruptcy petition in the United States Bankruptcy Court for the Middle District of Pennsylvania. App. II at 430. He died in an automobile accident on January 12, 1999, leaving his four children as the beneficiaries of his Estate.[2] Thereafter, Leah purported to exercise her rights under the provisions of the partnership agreement to buy out Victor's partnership interests for payment of no money. App. 112-113, 391, 395. While the partnership agreement provided for a buyout, it required the purchasing partner, *inter alia*, to give written notice within 30 days of the dissolution of the partnership. The timing of the dissolution of the Partnership thus became crucial to Leah's efforts to acquire 100% of the Partnership for nothing and to keep, for herself entirely, all the assets of WLP. If the Partnership had dissolved as a matter of law at an earlier date, Leah's notice was untimely and Victor's estate succeeded to his 50 percent interest in WLP.

2. Victor's beneficiaries are his four children. App. II at 115. Leah has never provided any money to her eldest son by Victor and stopped supporting her next eldest son once he turned 18. App. II 141-144. So, as a practical matter, this is a suit in which Leah asserts a right to dispossess her children of Victor's half interest in the partnership, paying them (through the Estate) nothing.

Leah filed a complaint on April 16, 1999 in the Common Pleas Court for Center County seeking a declaratory judgment that the interest of the Estate of Victor Woskob in the Partnership terminated by her purported purchase of the Estate's 50 percent interest in the Partnership for $0.00. The Estate filed a complaint on June 11, 1999 in the Common Pleas Court for Center County in which it alleged that the Partnership had been dissolved in 1997, prior to Victor Woskob's death in January 1999. The Estate alleged that, in light of the dissolution of the Partnership, Leah Woskob, the sole remaining partner, was required to wind up the affairs of the Partnership and to distribute the assets to the partners. The complaint sought (a) the appointment of a receiver to wind up the Partnership, (b) an accounting of the Partnership's operation since January 1997, and (c) disgorgement from Leah Woskob of one half of all Partnership monies she took from the Partnership while she was in exclusive control of the Partnership.

Leah Woskob filed a voluntary petition for bankruptcy under Chapter 11 on or about June 16, 1999, and both actions were removed to the bankruptcy court on or about July 7, 1999. The bankruptcy court found in favor of Leah in all respects.

The Estate appealed to the district court for the Middle District of Pennsylvania in both cases, and that court, by the Honorable James F. McClure, reversed and remanded the two cases to the bankruptcy court. The district court applied the provisions of the Uniform Partnership Act ("UPA"), which Pennsylvania and 26 other states have adopted,[3] to find that the partnership was dissolved as a matter of law on at least one of three occasions during 1997: when Victor filed for bankruptcy; when Victor excluded Leah from the Partnership; and when Leah excluded Victor from the Partnership. Leah's attempt to exercise her option to

3. Uniform Laws Annotated (West. Supp. 2001-2002), Vol. 6 at 160.

purchase Victor's or the Estate's interest in 1999 was untimely.[4]

Leah appealed to the Third Circuit, which vacated and remanded, finding that the Partnership dissolved as a matter of law only after Victor's death in January 1999. The Court found that neither Victor's bankruptcy, nor the partners' serial exclusions of each other from the partnership's affairs, had dissolved the partnership. The Estate moved for rehearing and rehearing en banc, but the Third Circuit denied that motion.

## Reasons for Granting the Writ

### I. The Third Circuit's Opinion Directly Conflicts With the Opinions of the Fourth and Fifth Circuits on the Preemption of the State Uniform Partnership Law by § 365(e) and Unnecessarily and Improperly Intrudes on State Law Governing the Formation and Continuation of a Partnership.

The decision of the two-judge panel below is in direct conflict with the Fourth Circuit's decision in *Shearin v. Shearin (In Re Shearin)*, 224 F.3d 346 (4th Cir. 2000), *cert. denied*, 531 U.S. 1149 (2001), and the Fifth Circuit's decision in *Phillips v. First City, Texas-Tyler, NA (In Re Phillips)*, 966 F.2d 926 (5th Cir. 1992). Certiorari is appropriate here to resolve that conflict.

The source of the conflict is the interplay between State partnership law and federal bankruptcy law. As the Fourth Circuit stated, "[i]t is this 'complex and often tortuous interaction between the Bankruptcy Code, state partnership law, and a [ ] partnership agreement' that causes consternation." *In Re Shearin*, 224 F.3d at 349 (citations omitted). State law, not bankruptcy law, regulates the formation and dissolution of business entities, including

4. The district court did not then reach the issue of whether, if Leah was not time-barred from exercising her option, she properly exercised it.

partnerships. Section 365(e) does not do so. In fact, it does not even address itself to State laws, like the Uniform Partnership Act, that affect the creation or dissolution of partnerships. Instead, § 365(e)(1) applies only to executory contracts[5] or unexpired leases, and specifically only to provisions included in such contracts that could disadvantage a debtor merely because of a bankruptcy filing.

Congress did not intend that § 365(e)(1) preempt the effect of State laws, like the Uniform Partnership Act. That intent is evident from an analysis of the entire § 365(e), particularly subparagraph 365(e)(2). The Fifth Circuit, in *In Re Phillips*, chided those bankruptcy courts that had used § 365(e)(1) to preempt State partnership laws. 966 F.2d at 935, n.11. *See also Finklestein v. Security Properties, Inc.*, 76 Wn. App. 733, 737, n.3, 888 P.2d 161, 165, n.3 (Wash. Ct. App. 1995), *rev. denied*, 127 Wn.2d 1002, 898 P.2d 307 (1995). In Finklestein, the Washington Court of Appeals followed the Fifth Circuit and held that § 365(e) did not preempt and overrule the provisions of Washington's State Uniform Partnership Act corresponding to 15 Pa. Cons. State. Ann. § 8353(5).

The Third Circuit misunderstood the nature of a partnership dissolution under the State UPA. A dissolution does not, *ipso facto*, end the partnership. Not until the partnership is completely wound up does the partnership terminate. 15 Pa. Con. Stat. Ann. § 8352. Thus, until the partnership terminates, the partners remain partners with all the rights given by law or by the partnership agreement itself. Since dissolution does not adversely affect a debtor by

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5. The only possible contract at issue is the partnership agreement, the terms of which are not the basis for the dissolution resulting from Victor's bankruptcy. Moreover, given Leah's complete exclusion of Victor from any role in the management or operation of the Partnership after June 1997, the partnership agreement was no longer executory. Victor had no services to perform and he performed none, thereby having – at best – a passive economic interest in the Partnership. Thus, § 365(e) could not apply since there was no executory contract involved at all.

depriving him of any benefits he may have enjoyed as a partner, and since dissolution does not affect his status as a partner, there is no basis on which to apply § 365(e). This is the essential reasoning of the Fifth Circuit in *Phillips*, which the Fourth Circuit followed in *Shearin*. It is also consistent with the fundamental purposes of the bankruptcy law to preserve and protect the debtors' economic interests for the benefit of creditors. *See, e.g., In Re Phillips*, 966 F.2d at 929.

The facts of the instant case confirm that reasoning. Here, the dissolution resulting from Victor's bankruptcy filing would neither terminate nor modify the partnership agreement; hence, the necessary prerequisites for the application of § 365(e)(1) did not exist. Victor – as the debtor whose filing triggered the dissolution – lost nothing and suffered no detriment to his partnership interest from the dissolution. Instead, the Partnership only had to be wound up, at which time both he and Leah would receive everything to which they were entitled as partners, without impairment of those interests in any way. The filing dissolved the partnership as an on-going enterprise but it did not diminish the debtor's interest in the partnership assets which he could claim at the termination when the dissolved partnership was wound up.

In ruling that § 365(e)(1) prohibits dissolution of the partnership upon a partner's bankruptcy filing, the Third Circuit ignored the language and purpose of the statute, as well as the prior decisions of the Fourth and Fifth Circuits in *Shearin*, 224 F.3d at 349 and *Phillips*, 966 F.2d at 929, respectively, and also the Washington Court of Appeals in *Finklestein*, 888 P.2d at 165-66. The ruling is a serious aberration which unnecessarily intrudes into and overrules State law governing the creation and dissolution of partnerships. Indeed, the ruling serves to federalize what had heretofore been the exclusive province of the States in determining when a partnership dissolves. By striking out on its own, the Third Circuit created a serious conflict on

this important issue with both the Fourth and Fifth Circuits so that Certiorari is necessary and appropriate.

## II. The Third Circuit's Decision Interpreting Pennsylvania's Uniform Partnership Act In the Context of Partnership Dissolution Conflicts With Those Decisions of the Pennsylvania Supreme Court, As Well As With Those of The First Circuit and Other State Courts Interpreting and Applying Similar Partnership Laws."

The decision of the two-judge panel below interprets §§ 8353 and 8354 of Pennsylvania's UPA to preclude a dissolution of a partnership where one partner excludes the other from participation in the management, operation, control and financial benefit of the partnership unless (a) the partnership agreement expressly provides for such exclusion, or (b) a court orders a dissolution. Moreover, the court below opined that, in the event of a court ordered dissolution, the effective date of dissolution would be the date of the decree, not the time of the exclusion itself. The Third Circuit's decision is in conflict not only with controlling decisions of the Pennsylvania courts interpreting it own law, but also with the First Circuit's decision in *Infusaid Corp. v. Intermedics Infusaid, Inc.*, 739 F.2d 661 (1st Cir. 1984), and decisions of the many other State courts where the UPA has been adopted. Certiorari is necessary and appropriate to resolve those conflicts and to insure uniformity in interpreting and applying the UPA in the many States that have adopted it.

Under the UPA, dissolution of a partnership occurs when one partner ceases to be associated in the carrying on of the business of the partnership. 15 Pa.Con.Stat.Ann. § 8351. In early 1997, the partnership of Leah and Victor, in life and in business, ceased immediately after Leah commenced divorce proceedings when Victor excluded Leah from any role in the operation, business, or financial rewards of the Partnership. Through the divorce, Leah

secured control for herself over the operations of the Partnership in June, 1997. She then excluded Victor from any role in the operation or financial rewards of the Partnership. As the Third Circuit itself recognized, such actions are sufficient to cause dissolution of the Partnership. App. A at page 9a. It erred in holding that such exclusion by one partner of another could only justify a court-ordered dissolution but could not effect a dissolution by virtue of the partners' own acts. The Third Circuit's holding that only a court can effect a dissolution, and that the partners cannot do so by their own acts, seriously diverges from the UPA and the decisions applying it in Pennsylvania and elsewhere.

Whenever partners express in actions or words their clear desire not to associate as partners, and go so far as to completely exclude the other from the partnership, the UPA provides that the partnership is thereby dissolved. No further court order is necessary or required, since the UPA expressly states that dissolution can occur in contravention of the partnership agreement by the will of a partner (without court intervention). *See* §§ 8353(1)(ii) and 8353(2).

The Pennsylvania Supreme Court interpreted the UPA to mean exactly what it says. In *Girard Bank v. Haley*, 460 Pa. 237, 332 A.2d 443, 446-47 (1975), it recognized that any partner has the power (but not necessarily the right) to dissolve the partnership at any time by a unilateral expression of will, without any "justification," and that a wrongful "expression of will to dissolve is effective as a dissolution even if in contravention of the agreement." The Pennsylvania Supreme Court has further held that the exclusion of a partner from participation in partnership affairs is an expression of will to dissolve the partnership, regardless of whether that dissolution is rightful, wrongful or court ordered. *See Herman v. Pepper*, 311 Pa. 104, 166 A. 587, 588 (1933); *Potter v. Brown*, 328 Pa. 554, 195 A. 901, 903-4 (1938). In *McClimans v. Barrett*, 276 Pa. Super. 557, 419 A.2d 598 (1980), the Pennsylvania Superior Court

further confirmed that the unilateral act of one partner in expressing his will to end the partnership automatically dissolved the partnership without the need for any judicial decree.

The First Circuit, in *Infusaid Corp*, likewise interpreted analogous provisions of the UPA to hold that once a partner was ousted from the partnership, there is a *per se* dissolution, which the court could not negate. *Id.* at 668. The leading treatises and other court interpretations of the UPA are also contrary to the Third Circuit's holding below. *See, e.g., Rodgers v. RAB Invest., Ltd.*, 816 S.W.2d 543, 548-49 (Tex. App. Dallas 1996); *Susman v. Cypress Venture*, 187 Ill. App. 3d 312, 543 N.E.2d 184 (Ill. App. Ct. 1st Dist. 1989); *Timmermann v. Timmermann*, 272 Or. 613, 538 P.2d 1254, 1260 (1975); *Cave v. Cave*, 474 P.2d 480, 484 (N.M. 1970); *Schoeller v. Schoeller*, 465 S.W.2d 648, 654 (Mo. Ct. App. 1971); *Mills v. Williams*, 113 Or. 528, 233 P. 542 (1925); A. Bromberg and L. Ribstein, *Bromberg and Ribstein on Partnership* § 7.06(c)(3); 59A Am. Jur.2d Partnership §§ 881 (1987). *See generally* Donald J. Weidner, *A Perspective to Reconsider Partnership Law*, 16 Florida State U.L. Rev. 1, 15 (1988), indicating that dissolution can occur without court intervention, even for causes other than those specified by the statute.

These uniform results are consistent with the nature of partnerships under the UPA. Partnerships are, in a very real way, predicated on a state of mind between the partners. Their continued existence turns on the partners' intent to go forward in business together. Hence, the law provides that partnerships can be dissolved at will. The Pennsylvania Supreme Court recognized and affirmed this when it characterized partnerships as essentially "personal" agency relationships. *Girard Bank*, 332 A.2d at 446-47. Partnership agreements cannot prevent a partner from acting to dissolve the partnership. They can only impose consequences on a partner who violates the terms of an agreement in dissolving the partnership. The Third

Circuit's opinion is contrary to the uniform cases and treatises cited above, which hold that courts have no power to deny that a dissolution has taken place, when a partner ousts another, or otherwise clearly evidences a will to cease his on-going association with the other (even where the dissolving partner breaches an agreement in doing so). The Third Circuit opinion imposes a unique gloss on the UPA that would artificially restrict partnerships from dissolving on this basis that is at odds with the UPA, as previously interpreted and applied in Pennsylvania and elsewhere.

Even if dissolution based on exclusion from a partnership could only be ordered by a court, the date of dissolution would relate back to the date of the acts causing the dissolution, not the date of the decree. *Miernicki v. Seltzer*, 312 Pa.Super 166, 458 A.2d 566, 570 (1983), *aff'd*, 505 Pa. 323, 479 A.2d 483, (1984). *See also Susman*, 543 N.E.2d 188; *Infusaid*, 739 F.2d at 668-670; *Dowell v. Bitner*, 273 Ill. App.3d 681, 652 N.E.2d 1372, 1379 (4th Dist. 1995); *Meuret v. Meuret*, 48 Or. App. 701, 617 P.2d 918, 919-20 (1980); *Master Garage, Inc. v. Bugdanowitz*, 690 P.2d 879, 881-82 (Colo. Ct. App. 1984); *Timmerman*, 538 P.2d at 1260; *Edwards v. Edwards*, 122 Idaho 963, 842 P.2d 299 (Idaho Ct. App. 1992). In *Girard Bank*, the Pennsylvania Supreme Court held that the partnership had dissolved well before the death of one partner when another partner's act of will evidenced her intention to no longer be associated with the other partners

The Third Circuit's opinion is in conflict with virtually all the other decisions on the issue of partnership dissolution because it ignored those other decisions. In cases like this, which involve the interpretation and application of substantive State law, federal courts are bound to follow State law and may not interpret it anew. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Coviello*, 233 F.3d 710, 713 (3d Cir. 2000), holding that "When ascertaining Pennsylvania law, the decisions of the Pennsylvania Supreme Court are, of course, the authoritative source."

The task of the federal courts "is to apply state law and not to form it." *Id.* at 716. *See also West v. American Telephone & Tel. Co.*, 311 U.S. 223, 236-237 (1940). The decisional law of the Pennsylvania intermediate courts is also highly relevant. A decision of the Superior Court "'is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.'" *Boyanowksi v. Capital Area Intermediate Unit*, 215 F.3d 396, 406 (3d Cir. 2000), *cert. denied*, 121 S. Ct. 566, *citing, West*, 311 U.S. at 237. Where a federal court must predict how a matter would be decided under state law, other federal appeals and district court decisions interpreting the state law, and decisions from other jurisdictions, should also be examined, in that order of importance. *Hughes v. Long*, 242 F.3d 121, 128 (3d Cir. 2001).

Because the Third Circuit's opinion departs so drastically from the Uniform Partnership Act, as applied by the Pennsylvania courts, as well as the First Circuit and other State courts applying that uniform law, certiorari is necessary to address that critical aberration and resolve the conflict created by the Third Circuit's opinion.

## Conclusion

For the foregoing reasons, the Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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# APPENDIX A

PRECEDENTIAL

Filed September 20, 2002

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 01-1482

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IN RE: LEAH BETH WOSKOB,
Debtor

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ALEX WOSKOB; HELEN WOSKOB;
THE ESTATE OF VICTOR WOSKOB

v.

LEAH BETH WOSKOB,
Appellant

---

On Appeal from the United States District Court
for the Middle District of Pennsylvania

District Court Judge: The Honorable James F. McClure
(D.C. Nos: 00-cv-01264 & 00-cv-01265)

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Argued on January 7, 2002

Before: MANSMANN,[1] RENDELL, and FUENTES,
*Circuit Judges.*

(Opinion Filed: September 20, 2002)

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1. The Honorable Carol Los Mansmann participated in the oral argument, but died before the opinion could be filed.

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**OPINION OF THE COURT**

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FUENTES, *Circuit Judge*:

Leah Woskob, the Debtor in bankruptcy, appeals from an order of the District Court determining that she did not timely exercise her option to purchase her late husband Victor's interest in their real estate partnership, the Woskob Legends Partnership (the "Legends Partnership"). Under the partnership agreement, Leah had 30 days from the date of an act of dissolution or 90 days from the death of a partner to exercise the option. She ultimately exercised it about two weeks after her husband died in an accident.

The Bankruptcy Court held that Leah had properly exercised the option. On appeal, the District Court reversed the Bankruptcy Court's decision, determining that the partnership had already been dissolved well before Victor's death by any one of the following three events: (1) Victor's exclusion of Leah from partnership proceeds; (2) Leah's exclusion of Victor from management and income during their pending divorce action; and (3) Victor's bankruptcy filing. Accordingly, the District Court held that Leah had not timely exercised her option to purchase Victor's interest.

We conclude that none of the three events cited by the District Court caused the dissolution of the partnership,

and that the partnership was dissolved only upon Victor's death. Thus, we will vacate the order of the District Court and will remand the case so that the District Court can properly determine, consistent with this opinion, whether Leah validly exercised her option to purchase Victor's interest in the partnership following his death.

## I.

Leah and Victor Woskob formed the Legends Partnership in 1996 for purposes of constructing, owning, and operating the Legends, an apartment building in State College, Pennsylvania. Leah and Victor, who were then married, each held a 50% interest in the partnership under the terms of the Partnership Agreement. As partners, Leah and Victor retained A.W. & Sons, a business owned by Victor's parents, to construct and later manage the Legends property.

In January of 1997, Leah and Victor separated, and Leah filed for divorce. During the divorce proceedings, Victor prevented Leah from receiving any distributions from the Legends Partnership. However, on April 15, 1997, the Pennsylvania Court of Common Pleas of Centre County granted Leah's petition for special relief and awarded her the exclusive right to manage and derive income from the Legends. On June 20, 1997, Leah terminated the management agreement with A.W. & Sons and hired another management company. On that same day, Victor filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code. He stated in the petition that he owned 50% of the partnership. Victor voluntarily withdrew the petition nine months later. The partnership tax returns for 1997 and 1998, both signed and filed by Leah, continued to list both Victor and Leah as general partners of the Legends Partnership.

On January 12, 1999, Victor died in an automobile accident. In his will, he had named his four children as beneficiaries of his estate (the "Estate"). He had also named his parents, Alex and Helen Woskob (the "Woskobs"), as executors. Within fifteen days of Victor's death, Leah notified the Woskobs that she intended to dissolve the

Legends Partnership and to purchase Victor's interest in the partnership pursuant to Paragraph 19 of the Partnership Agreement, which states in relevant part:

> Buy-Sell on Death of Partner
>
> XIX. The surviving Partner has the option to dissolve the Partnership on the death of a Partner. The surviving Partner shall have the right within ninety (90) days from the date of death of the deceased Partner to purchase the interest of the deceased Partner in the Partnership and to pay to the personal representative of the deceased Partner the value of that interest as provided in Paragraph 18 of this Agreement. . . . The estate of the deceased Partner shall be obligated to sell his or her Partnership interest as provided in this Agreement. . . . If the surviving Partner does not elect to purchase the interest of the deceased Partner, the Partnership shall terminate.

App. at 2:327-28. Based on the written opinion of the partnership's accountant, Leah advised the Woskobs that Victor's interest was negative in the amount of $33,944 and, thus, that the Estate was not entitled to any payments for the purchase of Victor's partnership interest. The Woskobs opposed the sale of the Legends Partnership to Leah.

On April 16, 1999, Leah filed a complaint for declaratory judgment in the Common Pleas Court, seeking an order declaring that the Estate's interest in the partnership terminated because it had been purchased by Leah pursuant to the terms of the Partnership Agreement. The Woskobs filed a separate complaint in the same court on June 11, 1999, alleging that the partnership had been dissolved in 1997 prior to Victor's death in 1999. Accordingly, they requested the appointment of a receiver to wind up the affairs of the partnership, a complete accounting of the partnership's affairs, and the fixing of damages for amounts alleged to have been wrongfully taken from the partnership by Leah.

After Leah filed a voluntary petition for bankruptcy under Chapter 11 of the Bankruptcy Code, both actions were removed to the United States Bankruptcy Court for the

Middle District of Pennsylvania. The Woskobs contended that Leah's attempt to purchase Victor's interest after his death in 1999 was untimely because the Legends Partnership had already been dissolved in 1997 by any one of three events, including (1) Victor's alleged exclusion of Leah from partnership after the marital separation, (2) the order of the Court of Common Pleas granting Leah the exclusive right to manage and derive income from the Legends, and (3) Victor's bankruptcy filing. If the partnership had been dissolved in 1997, then Leah's attempt to purchase Victor's interest in 1999 would have been untimely pursuant to Paragraph 17 of the Partnership Agreement, which reads:

> Option to Purchase Terminated Interest
>
> XVII. On dissolution of the Partnership by the withdrawal or other act of a Partner, the remaining Partner, *on written notice to the other Partner within thirty (30) days of the dissolution*, may continue the Partnership business by purchasing the interest of the other Partner in the assets and goodwill of the Partnership. The remaining Partner shall have the option to purchase the interest of the withdrawing Partner by paying to this Partner or the Partner's personal representative the value of the interest determined as provided in Paragraph 18 of this Agreement.

App. at 2:327 (emphasis added).

On June 14, 2000, the Bankruptcy Court ruled in favor of Leah, finding that the partnership was dissolved only upon Victor's death in 1999, and that Leah properly exercised her option to purchase Victor's interest in the partnership.

The Estate filed notices of appeal in both cases with the United States District Court for the Middle District of Pennsylvania. The District Court disagreed with the Bankruptcy Court as to the date of dissolution, finding that any one of the three events cited by the Woskobs was sufficient to cause the dissolution of the partnership in 1997. Accordingly, the District Court held that Leah's attempt to exercise her option to purchase Victor's interest

in 1999 was untimely and reversed and remanded the two cases to the Bankruptcy Court.

Leah now appeals from the decision of the District Court.

## II.

The District Court had jurisdiction over this case pursuant to 28 U.S.C. § 158(a). We have jurisdiction under 28 U.S.C. §§ 158(d) and 1291. Our standard of review over a district court's bankruptcy decision is the same as that exercised by the district court. *See In re Continental Airlines*, 125 F.3d 120, 128 (3d Cir. 1997) (citing *Brown v. Pennsylvania State Employees Credit Union*, 851 F.2d 81, 84 (3d Cir. 1988)). Accordingly, we review the bankruptcy court's factual findings only for clear error, but exercise plenary review over any legal determinations. *See In re O'Dowd*, 233 F.3d 197, 201-02 (3d Cir. 2000). Because Leah and Victor formed and managed the Legends Partnership in Pennsylvania, and because Pennsylvania was the partnership's principal place of business, we apply the law of Pennsylvania in determining the partnership's date of dissolution. *See* Restatement (Second) Conflict of Laws § 294 (1971).

## III.

The Uniform Partnership Act (UPA), as adopted by Pennsylvania, defines the "dissolution" of a partnership as "the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on, as distinguished from the winding up, of the business." 15 Pa.C.S. § 8351. The timeliness of Leah's attempt to exercise her option to buy Victor's interest in the Legends Partnership under the Partnership Agreement depends upon the partnership's date of dissolution.

Dissolution can be caused by decree of court or automatically through operation of law. 15 Pa.C.S. §§ 8353 (dissolution by operation of law) and 8354 (dissolution by decree of court). When dissolution occurs through operation of law and without the need for a judicial decree, the date of dissolution is the date of the first effective act of

dissolution. *See Girard Bank v. Haley*, 332 A.2d 443, 447 (Pa. 1975) (holding date of dissolution to be date of partner's expression of will to dissolve partnership, not date of partner's subsequent death). When a partnership is dissolved by decree of court, the date of dissolution is ordinarily the date upon which the court decrees the dissolution, unless the court specifies otherwise. *See Scheckter v. Rubin*, 36 A.2d 315, 315-16 (Pa. 1944).

Although no court ever decreed the dissolution of the Legends Partnership, there is no doubt that the partnership was eventually dissolved through operation of law. If the partnership was not dissolved before Victor's death, it was certainly dissolved upon his death under 15 Pa.C.S. § 8353, which provides that the "death of any partner" causes the dissolution of a partnership. 15 Pa.C.S. § 8353(4). The question before us is whether any other events had already served to dissolve the partnership through operation of law prior to Victor's death.

The Estate contends that three separate events, each of which occurred more than a year and a half before Victor's death, were sufficient to dissolve the partnership. The first event was Victor's alleged exclusion of Leah from the partnership after the marital separation. Second was Leah's alleged exclusion of Victor after the Court of Common Pleas granted her petition for special relief. The third partnership-dissolving event, according to the Estate, was Victor's filing for bankruptcy in June 1997. For the reasons set forth below, we find that none of these three events caused the dissolution of the Legends Partnership.

### A. The Exclusions

In finding that the alleged exclusions or expulsions from the partnership of Leah and then Victor were each sufficient to dissolve the Legends Partnership, the District Court observed that a "dissolution in these circumstances can be effected before a court ever gets involved, and a partnership can be immediately dissolved by a wrongful exclusion." App. at 1:33. In other words, the court found that a wrongful exclusion can dissolve a partnership automatically through operation of law.

Before it becomes necessary to determine whether the events described by the Estate constituted wrongful exclusions from the partnership, we first consider whether the District Court was correct in finding that such exclusions are sufficient to dissolve a partnership through operation of law and without the need for a judicial decree.

In support of its finding, the District Court relied primarily on *In re Crutcher*, 209 B.R. 347 (Bankr.E.D.Pa. 1997), a case in which a debtor was wrongfully expelled from a partnership, and then, a year later, petitioned the court for dissolution of the partnership. *Id.* at 352. The *Crutcher* court held that the partnership had dissolved as of the date of the debtor's expulsion, and that the filing date of the debtor's petition for dissolution was "irrelevant to the date of dissolution." *Id.* The court explained:

> To determine the date of dissolution, it is necessary first to consider the cause of dissolution. Under the Pennsylvania Uniform Partnership Act ("PUPA"), specifically 15 Pa.C.S. § 8353(1)(iv), dissolution is caused by the "expulsion of any partner from the business . . . ."

*Id.* Regarding the act of expulsion as the cause of dissolution, the court treated the date of expulsion as the date of dissolution. Unfortunately, in failing to quote and consider the second half of § 8353(1)(iv), the court improperly broadened the scope of that subsection.

In its entirety, § 8353(1)(iv) provides that dissolution is caused, without violation of the agreement between the partners, "[b]y the expulsion of any partner from the business bona fide *in accordance with such a power conferred by the agreement between the partners.*" 15 Pa.C.S. § 8353(1)(iv) (emphasis added). The full text makes clear that not all partner expulsions are sufficient to cause automatic dissolution through operation of law. Only those expulsions that are in accordance with an expulsion power conferred by the partnership agreement will cause an immediate dissolution.

The court in *Crutcher* failed to differentiate partner expulsions that automatically *cause* the dissolution of partnerships from those that merely serve as potential

*grounds* for dissolution by judicial decree. The latter category lies within the purview of § 8354(a), which provides the following general rule:

> On application by or for a partner, the court shall decree a dissolution whenever:
>
> (1) A partner has been declared a lunatic in any judicial proceeding or is shown to be of unsound mind.
>
> (2) A partner becomes in any other way incapable of performing his part of the partnership contract.
>
> (3) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business.
>
> (4) A partner willfully or persistently commits a breach of the partnership agreement or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him.
>
> (5) The business of the partnership can only be carried on at a loss.
>
> (6) Other circumstances render a dissolution equitable.

15 Pa.C.S. § 8354(a). It is not difficult to see how the acts of one or more partners to exclude another partner from the partnership could serve as grounds for dissolution under the broad language of §§ 8354(a)(4) or (a)(6). Such acts of exclusion by a partner would likely tend to make it "not reasonably practicable to carry on the business in partnership with him." 15 Pa.C.S. § 8354(a)(4). Further, it does not seem farfetched that the expulsion of a partner would constitute a circumstance that "render[s] a dissolution equitable." 15 Pa.C.S. § 8354(a)(6).

The key point, however, is that when such acts of exclusion are not committed "in accordance with [an expulsion] power conferred by the agreement between the partners," they do not result in the instantaneous dissolution of the partnership. They merely serve as

grounds by which a court can decree a dissolution under § 8354. *See Herman v. Pepper*, 166 A. 587, 588 (Pa. 1933) (noting that "[t]he exclusion of one partner by another . . . is undoubtedly *ground* for dissolution by a court of equity") (emphasis added); *see also Potter v. Brown*, 195 A. 901, 903-04 (Pa. 1938) (observing that it is "well settled" that the exclusion of a partner is a ground for dissolution).

In this case, because the alleged acts of exclusion from the Legends Partnership by Leah and Victor were not in accordance with an expulsion power explicitly conferred by the Partnership Agreement, they did not cause the dissolution of the partnership. At the very most, such exclusionary acts could have served as grounds for dissolution if either Leah or Victor had applied for a dissolution by decree of court pursuant to § 8354. Since neither of them did so, the claimed exclusions are irrelevant to the partnership's date of dissolution. That being the case, there is no need for us to determine whether Leah or Victor had ever actually been wrongfully excluded from the partnership.

### B. The Bankruptcy Filing

The Estate next contends that, even if an exclusion of Leah or Victor did not cause the dissolution of the Legends Partnership, the partnership was dissolved when Victor filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code. This argument raises the question of whether the bankruptcy of a general partner results in the dissolution of the partnership.

At first glance, Pennsylvania law appears to provide a clear answer. Under § 8353, the bankruptcy of a partner, unlike the general expulsion of a partner, does in fact cause the automatic dissolution of the partnership. 15 Pa.C.S. § 8353(5). Our analysis would end neatly right here if our concerns extended only to the application of Pennsylvania law. We must also consider, however, the role of federal bankruptcy law and the impact of its interplay with state partnership law. As a survey of the case law reflects, in attempting to reconcile the Bankruptcy Code with state law on this issue of partnership dissolution, courts have been

largely divided. *Compare, e.g., In re Nizny*, 175 B.R. 934, 939 (Bankr.S.D.Ohio 1994) (holding that filing of federal bankruptcy case by partner does not dissolve general partnership); *In re Hawkins*, 113 B.R. 315, 316-17 (Bankr.N.D.Tex. 1990) (same); *In re Todd*, 118 B.R. 432, 435 (Bankr.D.S.C. 1989) (same); *In re Corky Foods Corp.*, 85 B.R. 903, 904 (Bankr.S.D.Fla. 1988) (same); *In re Safren*, 65 B.R. 566, 569-70 (Bankr.C.D.Cal. 1986)(same), *with Phillips v. First City, Texas-Tyler, N.A. (In re Phillips)*, 966 F.2d 926, 929 (5th Cir. 1992) (holding that partner's federal bankruptcy filing causes dissolution of partnership); *In re Burnett*, 241 B.R. 438, 439 (Bankr.E.D.Ark. 1999) (same); *In re Sunset Developers*, 69 B.R. 710, 712-13 (Bankr.D.Idaho 1987) (same); *Finkelstein v. Security Properties, Inc.*, 888 P.2d 161, 164 (Wash.Ct.App. 1995) (same). The contrary holdings of the Bankruptcy Court and the District Court in this case further reflect the confusion and controversy that has surrounded this issue. We review their findings as a starting point for our analysis.

In holding that Victor's bankruptcy filing did not cause the dissolution of the Legends Partnership, the Bankruptcy Court reasoned that the Partnership Agreement constitutes an executory contract and, as such, cannot be dissolved pursuant to 11 U.S.C. § 365(e)(1).[2] That section of the Bankruptcy Code states:

> Notwithstanding a provision in an executory contract . . . or in applicable law, an executory contract . . . of the debtor may not be terminated or modified . . . at any time after the commencement of the case solely because of a provision in such contract . . . that is

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2. The District Court agreed with the Bankruptcy Court's holding that the Partnership Agreement constitutes an executory contract, which appears to be consistent with the majority rule. *See, e.g., Summit Inv. & Dev. Corp. v. Leroux*, 69 F.3d 608, 610 n.3 (1st Cir. 1995); *In re Siegal*, 190 B.R. 639, 643 (Bankr.D.Ariz. 1996); *Nizny*, 175 B.R. at 936; *Clinton Court*, 160 B.R. at 60; *Corky Foods Corp.*, 85 B.R. at 904. *But cf. In re Smith*, 185 B.R. 285, 293 (Bankr.S.D.Ill. 1995) (finding that limited partnership agreement should not be considered executory contract if limited partner is purely passive investor not owing substantial future performance to limited partnership). In any case, the parties do not contest this issue on appeal.

> conditioned on . . . the commencement of a case under this title.

11 U.S.C. § 365(e)(1)(B). In other words, § 365(e)(1) invalidates *ipso facto* provisions, which, in this context, are provisions of law or contract which specify that "a bankruptcy filing *per se* will terminate or modify" an executory contract. *In re Clinton Court*, 160 B.R. 57, 59 (Bankr.E.D.Pa. 1993). Because § 8353(5) of Pennsylvania's UPA provides for the dissolution (or "modification") of a partnership agreement upon the bankruptcy of a partner, the Bankruptcy Court concluded that §8353(5) is an *ipso facto* provision and that § 365(e)(1) prevented it from causing the dissolution of the Legends Partnership.

In stark disagreement with the Bankruptcy Court, the District Court held that Victor's bankruptcy did, in fact, constitute an event sufficient to cause the dissolution of the partnership. In doing so, the court relied heavily on the following language in a footnote in *Crutcher*:

> While this court held, in *In re Clinton Court*, 160 B.R. 57, 58-60 (Bankr.E.D.Pa. 1993), that a bankruptcy filing by a partner should not preclude a partnership from filing a bankruptcy case, on the grounds that this result would violate 11 U.S.C. § 365(e)(1), the partnership is not a debtor here. Thus, § 365(e)(1) does not come into play. It therefore appears that . . . the partnership would necessarily have to be held to have been dissolved as of [the date the partner filed individually for bankruptcy].

*Crutcher*, 209 B.R at 352 n.2. Noting that the partnership is not a debtor in this case, the District Court similarly concluded that § 365(e)(1) does not apply and, thus, that Victor's bankruptcy filing resulted in the dissolution of the partnership under § 8353(5).

In considering the applicability of § 365(e)(1), we find that the District Court's reliance on *Crutcher* is misplaced. As the District Court explained, *Crutcher* does appear to suggest that "§ 365(e)(1) does not come into play" when "the partnership is not a debtor." 209 B.R. at 352 n.2. However, we see no support outside of *Crutcher* for that proposition.

In fact, such a holding appears contrary to *Clinton Court*, the case to which *Crutcher* cites on this point.

In *Clinton Court*, more than two years after one of two partners of a general partnership filed for bankruptcy, the partnership itself filed for bankruptcy. 160 B.R. at 58. Citing to § 8353(5), a secured creditor of the partnership claimed that the partnership had been dissolved upon the individual partner's bankruptcy filing. *Id. Clinton Court* rejected that argument, finding that § 365(e)(1) prevented the partner's bankruptcy from causing the dissolution of the partnership. *Id.* at 60. While it is true that the partnership was a debtor in *Clinton Court*, there is no reason to believe that the applicability of § 365(e)(1) depended upon the partnership's debtor status. Indeed, the facts underlying *Clinton Court* show otherwise. If § 365(e)(1) were to come into play only when the partnership is a debtor, then the individual partner's bankruptcy filing, which occurred over two years *prior* to the partnership's bankruptcy, would have caused the partnership to dissolve as a matter of law under § 8353(5). Because the court in *Clinton Court* held that the individual partner's bankruptcy filing did *not* dissolve the partnership at a time when the partnership was not a debtor, it would be entirely inconsistent for the court to have regarded a partnership's debtor status as a necessary condition for the applicability of § 365(e)(1).

Thus, we reject the District Court's conclusion that, as a result of the partnership's non-debtor status, § 365(e)(1) is inapplicable to this case. We see no reason why the statute's applicability should hinge upon whether the partnership itself has filed for bankruptcy. This is not to say, however, that we have now settled the question of whether § 365(e)(1) prevented the dissolution of the Legends Partnership. Courts have held that, under certain circumstances, other subsections of the Bankruptcy Code, namely §§ 365(e)(2)(A) and 365(c), preclude § 365(e)(1) from invalidating *ipso facto* provisions that would dissolve a partnership.[3] *See, e.g., Sunset Developers*, 69 B.R. at 712-

3. We note that this position is in contrast with the recommendation of the National Bankruptcy Review Commission, an independent

13 (holding that § 365(c) prevented § 365(e) from applying to partnership agreement); *Finkelstein*, 888 P.2d at 165 n.3 (holding that "[s]ection 365(e)(2) clarifies Congress' intention to prevent only private contracts from counteracting the Bankruptcy Code, not to prevent state law, such as partnership law, from determining the status of a partnership"); *cf. In re Harms*, 10 B.R. 817, 821-22 (Bankr.D.Colo. 1981) (holding that limited partnership dissolved on day of general partner's bankruptcy filing because, "[u]nder Section 365(c) of the Bankruptcy Code, executory [limited] partnership agreements cannot be assumed by a debtor-in-possession without the consent of all the limited partners"). We now consider the impact of these subsections in this case.

As we discussed above, § 365(e)(1)(B) provides that an executory contract of a debtor cannot be terminated or modified by a provision of law or contract that is conditioned upon the commencement of the debtor's case under the Bankruptcy Code. The scope of this anti-*ipso facto* provision is limited, however, by § 365(e)(2), which reads, in relevant part:

> (2) Paragraph (1) of this subsection does not apply to an executory contract . . . of the debtor, whether or not such contract . . . prohibits or restricts assignment of rights or delegation of duties, if—

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commission established through the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994). In its Final Report, filed in 1997, the Commission recommended that "*[i]pso facto* provisions relating to partnerships, LLCs, and the rights or interests of partners or LLC members should not be enforceable under the Bankruptcy Code." National Bankruptcy Review Commission, *Bankruptcy: The Next Twenty Years* § 2.3.22, at 432 (1997). The Commission went on to explain:

> This position is consistent with the Bankruptcy Code treatment of *ipso facto* provisions in other types of property interests. [Footnote omitted.] Just because a partner or LLC member has sought relief under the Bankruptcy Code, there is no compelling interest served by mandating an automatic dissolution of the partnership or buyout of the debtor partner's interest.

*Id.* § 2.3.22, at 435.

> (A)(i) applicable law excuses a party, other than the debtor, to such contract . . . from accepting performance from or rendering performance to the trustee or to an assignee of such contract . . . , whether or not such contract . . . prohibits or restricts assignment of rights or delegation of duties; and
>
> (ii) *such party does not consent to such assumption or assignment* . . . .

11 U.S.C. § 365(e)(2)(A) (emphasis added). In interpreting this limitation on § 365(e)(1), we must also consider the impact of § 365(c), which closely tracks the language of § 365(e)(2). In relevant part, § 365(c)(1) states:

> (c) The trustee may not assume or assign any executory contract . . . of the debtor, whether or not such contract . . . prohibits or restricts assignment of rights or delegation of duties, if—
>
> (1)(A) applicable law excuses a party, other than the debtor, to such contract . . . from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract . . . prohibits or restricts assignment of rights or delegation of duties; and
>
> (B) *such party does not consent to such assumption or assignment* . . . .

11 U.S.C. § 365(c)(1) (emphasis added).

As the Ninth Circuit noted in *In re Catapult Entertainment, Inc.*, 165 F.3d 747 (9th Cir. 1999), "the proper interpretation of § 365(c)(1) has been the subject of considerable disagreement among courts and commentators." *Id.* at 749; *see generally* William J. Norton, Jr., *Norton Bankruptcy Law and Practice* § 155:2 (2d ed. 2001); Lawrence D. Cherkis et al., *Collier Real Estate Transactions and the Bankruptcy Code* ¶ 4.07[2] (2001); Daniel J. Bussel & Edward A. Friedler, *The Limits on Assuming and Assigning Executory Contracts*, 74 Am. Bankr. L.J. 321 (2000). We find that it is not necessary in this case, however, to delve into the complex issues of statutory interpretation that have arisen from the contours

of § 365. Because there is no evidence that Leah did not consent to remaining partners with Victor during the period in which he had become a debtor, we hold that neither §§ 365(c)(1) nor 365(e)(2)(A) precluded or limited the application of § 365(e)(1).

By their own terms, § 365(c)(1) and § 365(e)(2)(A) are applicable to executory contracts only when the non-debtor party "does not consent to [the] assumption or assignment" at issue. 11 U.S.C. § 365(c)(1)(B) and § 365(e)(2)(A)(ii). In the partnership context, at issue is whether a partner who becomes a debtor after filing for bankruptcy will assume the same partnership role that he had prior to becoming a debtor. When a partner files for bankruptcy, a co-partner may not want to continue in the partnership with the debtor because, "upon securing bankruptcy-court protection, a general partner who becomes a debtor-in-possession of her personal estate necessarily assumes responsibilities to her creditors that conflict with her responsibilities to her co-partners." *Phillips*, 966 F.2d at 929 (citing *Harms*, 10 B.R. at 822). Subsections 365(c) and 365(e)(2) will prevent a debtor in bankruptcy from continuing to serve as a partner, however, only when a non-debtor partner does not consent to continue in the partnership with the debtor.

In this case, there is no evidence whatsoever that Leah objected to having Victor remain as her general partner after he had filed his bankruptcy petition. In fact, the record demonstrates that Leah, with full knowledge that Victor had filed for bankruptcy, continued to regard Victor as her general partner. The partnership tax returns for 1997 and 1998, both of which were signed and filed by Leah, continued to list Victor as a general partner despite his debtor status. Although she had ample opportunity, Leah took no steps indicating that she did not consent to Victor's continuing status as a general partner after he filed his bankruptcy petition. In light of these facts, we find that Leah effectively consented to remain partners with Victor despite his debtor status and, thus, that § 365(c)(1) and § 365(e)(2)(A) do not apply. That being the case, we conclude that § 365(e)(1) is fully applicable here and, therefore, Victor's bankruptcy filing did not result in the dissolution of the Legends Partnership.

## IV.

Because we find that the acts of exclusion and the bankruptcy filing discussed above did not result in the dissolution of the Legends Partnership, we conclude, pursuant to 15 Pa.C.S. § 8353(4), that the event which actually caused the dissolution of the partnership was Victor's death on January 12, 1999. Having improperly concluded that the partnership was dissolved prior to Victor's death, the District Court did not reach the question of whether Leah properly exercised her option to purchase Victor's partnership interest in accordance with Paragraphs 18 and 19 of the Partnership Agreement. Thus, we will vacate the District Court's order and will remand the case for the District Court to determine whether Leah validly exercised her option to purchase Victor's interest.

*RENDELL*, Circuit Judge, *Concurring:*

I agree with Judge Fuentes that the events relied upon did not cause a dissolution of the partnership. I write separately merely to note that my agreement with the result we reach — by way of a complex path — is based not only on the statutes and case law, but also on the context presented to us and the facts of this case, as well as the further support I find in the applicable provisions of the partnership agreement at issue.

Surprisingly, there is a paucity of case law on the issue of when a dissolution occurs as a matter of law. None of the cases we rely upon have answered the precise question before us. I fear that the lack of direction from the case law makes the analysis seem a bit torturous, but I think that it becomes somewhat smoother when the facts, especially the agreement itself, are considered.

The task actually presented to the District Court, and to us, is the construction of the parties' agreement. It seems clear that the parties' intention, as reflected in the language they chose and in their conduct, compels the result we reach. *See McClimans v. Barrett*, 419 A.2d 598, 600 (Pa. Super. Ct. 1980) ("A partnership agreement as a contract must be interpreted in accordance with the intent of the parties . . . ."). For one thing, the parties' agreement gives the other party, in the event of "dissolution by withdrawal or other act of one partner," the ability to "continue the Partnership business" by purchasing the other's interest. This anticipates an act of dissolution that would result in a winding up or discontinuance of the business. Here, there is no hint that either of the events asserted impacted the continued existence of the partnership or its business. And, after each of the relevant events, the parties themselves demonstrated an intent that the partnership continue as an ongoing entity, with Victor himself listing his partnership interest as an asset in his bankruptcy proceeding and tax returns' having been filed listing both Victor and Leah as partners.

Accordingly, I agree with Judge Fuentes that a triggering "dissolution" did not occur here.

A True Copy:
Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

# APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 01-1482

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IN RE: LEAH BETH WOSKOB,
Debtor

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ALEX WOSKOB; HELEN WOSKOB;
THE ESTATE OF VICTOR WOSKOB

v.

LEAH BETH WOSKOB,
Appellant

---

On Appeal from the United States District Court
for the Middle District of Pennsylvania

District Court Judge: The Honorable James F. McClure
(D.C. Nos: 00-cv-01264 & 00-cv-01265)

---

Present: BECKER, Chief Judge, SLOVITER, SCIRICA,
NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY,
AMBRO, FUENTES and SMITH, Circuit Judges

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**SUR PETITION FOR REHEARING EN BANC**

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The Petition for Rehearing filed by Appellees in the above-entitled matter, having been submitted to the judges who participated in the decision of this court, and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the Petition for Rehearing by the panel and the Court en banc, is hereby DENIED.

BY THE COURT,

/s/ xxxxxxxxxxxxx

United States Circuit Judge

DATED: November 1, 2002
KB/cc: SSH; DJD

# APPENDIX C

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

| | | |
|---|---|---|
| In re: | : | |
| LEAH BETH WOSKOB | : | Bnkr. No. 1-99-02600 |
| | : | |
| *Debtor* | : | |

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| | | |
|---|---|---|
| ESTATE OF VICTOR WOSKOB | : | Adv. No. 1-99-00219A |
| and ALEX AND HELEN WOSKOB, | : | No. 4:00-CV-00-1265 |
| | : | |
| *Plaintiffs/Appellants* | : | |
| | : | |
| *v.* | : | (Judge McClure) |
| | : | |
| LEAH BETH WOSKOB, | : | |
| | : | |
| *Defendant/Appellee* | : | |

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| | | |
|---|---|---|
| LEAH BETH WOSKOB, | : | Adv. No. 1-99-00220A |
| | : | No. 4:00-CV-00-1264 |
| *Plaintiff/Appellee* | : | |
| *v.* | : | |
| | : | (Judge McClure) |
| ALEX WOSKOB and HELEN WOSKOB, | : | |
| EXECUTORS OF THE ESTATE OF | : | |
| VICTOR M. WOSKOB, | : | |
| | : | |
| *Defendants/Appellants* | : | |

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# MEMORANDUM

February 6, 2001

## BACKGROUND

On April 16, 1999, Leah Beth Woskob ("Leah") filed a complaint in the Court of Common Pleas of Centre County seeking a declaratory judgment that she legally exercised her option to purchase the 50% interest in Woskob Legends Partnership ("the partnership") that her late husband Victor Woskob ("Victor") left behind after his death. Alex and Helen Woskob, as executors of the estate of Victor Woskob ("the estate"), answered the complaint and asserted that Leah did not timely exercise her option to buy Victor's interest.

On June 11, 1999, the estate filed a complaint in the Court of Common Pleas of Centre County. The complaint alleged that the partnership had dissolved in 1997 and that Leah did not timely exercise her option to buy Victor's interest in the partnership. The estate asked the court to 1) appoint a receiver to wind up the affairs of the partnership; 2) provide an accounting of the partnership's operations since January 1997; and 3) compel Leah to give up one half of the partnership money she received while she was in exclusive control of the partnership.

On June 15, 1999, Leah filed a voluntary Chapter 11 petition with the United States Bankruptcy Court for the Middle District of Pennsylvania. Both actions in the Court of Common Pleas were removed to the bankruptcy court. On June 14, 2000, after a day-long trial adjudicating the two actions, the bankruptcy court entered judgment in favor of Leah on both claims.

On July 17, 2000, the estate filed with this court a notice of appeal from the order of the bankruptcy court. We must now determine whether the bankruptcy court erred in one or both of its judgments.

**DISCUSSION:**

## I. STANDARD OF REVIEW

A district court sits as a court of appeals reviewing a final order of the bankruptcy court under 28 U.S.C. § 158(a)(1). *See also* Fed. Bankr. R. 8001(a). Under Fed. Bankr. R. 8013, the district court may affirm, modify, or reverse the decision of the bankruptcy court, or may remand with instructions for further proceedings. The district court reviews the bankruptcy court's legal determinations *de novo,* its factual findings for clear error, and its exercise of discretion for abuse thereof. *In re O'Brien Environmental Energy, Inc.,* 188 F.3d 116, 122 (3d Cir. 1999). When an issue is a mixed question of law and fact, the issue is broke down into its component parts and the appropriate standard is applied to each component. *In re Fegley,* 118 F.3d 979, 982 (3d Cir. 1997).

## II. STATEMENT OF FACTS

In 1996, Leah and Victor formed the partnership for the purposes of constructing the Legends Apartments ("the Legends"). They were equal partners under the terms of their partnership agreement. Lean and Victor retained A.W. & Sons to construct and later manage the apartments.

In January 1997, Leah and Victor separated, and Leah filed for divorce in the Pennsylvania Court of Commen Pleas of Centre County. During the divorce proceedings, Victor prevented Leah from receiving any distributions from the partnership. On April 15, 1997, the Court of Common Pleas granted Leah's petition for special relief and issued an order giving the exclusive right to manage and derive income from the Legends.

In June 1998, Victor filed and later withdrew a bankruptcy petition in the United States Bankruptcy Court for the Middle District of Pennsylvania. In this petition, he stated that he owned 50% of the partnership.

In January 1999, Victor was killed in a car accident. In his will he named his four children as beneficiaries and the Woskobs as executors of his estate. After Victor's death, Leah notified the Woskobs of her intention to purchase Victor's interest.

The partnership agreement contained various clauses governing the partners' rights in the event of a dissolution of the partnership; the provisions provided for different causes of dissolution, including a partner's death, the withdrawal of a partner, and a partner's so-called "other act." These provisions will be discussed further as they relate to the parties' arguments.

## III. THE DECISION OF THE BANKRUPTCY COURT

We will briefly summarize the decision of the bankruptcy court while referring to specific sections of the opinion as needed below. In the bankruptcy proceeding, the main issue was whether Leah timely exercised her option to purchase Victor's share of the partnership, as the agreement decreed that the option must have been exercised within 30 days of the dissolution of the partnership. Seeking to keep Leah from obtaining the partnership, the estate argued that the partnership dissolved at three distinct times before Victor's death, and that Leah did not take steps at any of these times to purchase the remaining interest of the partnership. The estate further argued that even if the partnership did not dissolve until Victor's death, Leah was not entitled to Victor's interest because she did not conform to the agreement in attempting to exercise her option to buy.

The bankruptcy court found in favor of Leah in all respects. It determined that none of the three events proffered by the estate was sufficient to cause a dissolution of the partnership, and found that the partnership stayed intact until Victor's death in 1999. It ruled that the partnership was dissolved only upon Victor's death, and

that Leah properly exercised her option to purchase the remaining interest in the partnership.

## IV. REVIEW

The parties disagree on whether Leah conformed to the agreement when she attempted to exercise her option to purchase the remaining interest of the partnership. The relevant provisions of the partnership agreement are as follows:

> Option to Purchase Terminated Interest
>
> XVII. On dissolution of the Partnership by the withdrawal or other act of a Partner, ***on written notice to the other Partner within thirty (30) days of the dissolution,*** may continue the Partnership business by purchasing the interest of the other Partner in the assets and goodwill of the Partnership. The remaining partner shall have the option to purchase the interest of the withdrawing Partner by paying to this Partner or the Partner's personal representative the value of the interest as provided in Paragraph 18 of this Agreement.
>
> Purchase Price of Partnership Interest
>
> XVIII. On exercise of the option described in Paragraph 17, above, the remaining Partner shall pay to the person who is legally entitled to it the **net book value** of the interest as shown on the last regular accounting of the Partnership preceding the dissolution together with the full unwithdrawn portion of the deceased, withdrawing, or terminated Partner's distributive share of any net profits earned by the Partnership between the date of the accounting and the date of the dissolution of the Partnership.
>
> Buy-Sell on Death of Partner
>
> XIX. The surviving Partner has the option to dissolve the Partnership on the death of a Partner. The surviving Partner shall have the right within ninety (90) days from the date of death of the deceased Partner

> to purchase the interest of the deceased Partner in the Partnership and to pay to the personal representative of the deceased Partner the value of that interest as provided in Paragraph 18 of this Agreement. . . The estate of the deceased Partner shall be obligated to sell his or her Partnership interest as provided in this Agreement . . . ***If the surviving Partner does not elect to purchase the interest of the deceased Partner, the Partnership shall terminate.***

(emphasis added).

As the above clauses indicate, Leah's interest in the partnership depends on 1) whether she was timely in her notice to Victor of her intention to buy his interest; and 2) whether she followed the correct procedure in exercising her option to purchase. The issues before the court, then, are as follows. First, we must determine when the partnership was in fact dissolved. Second, we must determine whether Leah properly exercised her option to buy Victor's interest in the partnership.

**A. Dissolution**

Dissolution is defined as "the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on, as distinguished from the winding up, of the business." 59 Pa.C.S. § 351. "On dissolution, the partnership is not terminated but continues until the winding up of partnership affairs is completed." 59 Pa.C.S. § 8352. "The termination of a partnership is markedly different from the dissolution of a partnership. When a partnership has terminated it ceases doing business; when a partner effects a dissolution it simply means that partner is no longer associated with the business of the partnership." *Canter's Pharmacy v. Elizabeth Assoc.*, 578 A.2d 1326, 1329 (Pa. Super. 1990).

"Dissolution of a partnership is caused . . . by the express will of any partner." *Girard Bank v. Haley*, 460 Pa. 237, 243 (1975) (quoting 59 P.S. § 93). "If no definite term or

particular undertaking (is) specified in the partnership agreement, such an at-will dissolution does not violate the agreement between the partners; indeed, an expression of a will to dissolve is effective as a dissolution even if in contravention of the agreement." *Id.*

The estate argues that the partnership was dissolved on at least one of these three occasions:

1) In 1997, when Victor wrongfully excluded Leah from receiving proceeds from the business;

2) In 1997, when the Pennsylvania Court of Common Pleas granted Leah the exclusive right to manage and derive income from the Legends Apartments; or

3) In 1998, when Victor individually filed for bankruptcy. Leah, of course, argues that none of these three events was sufficient to cause dissolution.

Leah, of course, argues that none of these three events was sufficient to cause dissolution.

*1. Victor's Exclusion of Leah in 1997*

The estate's first argument is that dissolution occurred when Victor excluded Leah from the partnership in 1997. "The exclusion of one partner by another from the management of the partnership business or possession of the partnership property is undoubtedly ground for dissolution by a court of equity." *Herman v. Pepper,* 311 Pa. 104, 108 (1933). "'Each member of a partnership, in the absence of an agreement to the contrary, has the right to share in the management of the firm affairs and to participate in the profits, and a refusal of one or both of these rights is sufficient to warrant a decree of dissolution of the partnership and the appointment of a receiver.'" *Id.* (quoting *Rische v. Rische,* 101 S.W. 849, 850 (Tex. Civ. App. 1907)). Whether a partner is excluded from a partnership is a question of fact. *See In re Crutcher,* 209 B.R. 347, 350 (Bankr. E.D. Pa. 1997).

The *Herman* court found dissolution when one partner denied that the other partner had any interest in the partnership property or profits, denied him "any voice in the management of the enterprise, and excluded him entirely from participation in partnership affairs." *Id.* at 109. A similar case is *In re Crutcher,* 209 B.R. 347 (Bankr. E.D. Pa. 1997), where the court, relying on *Herman,* found a dissolution of the partnership when one partner "was not permitted to participate in the daily operation of the business, . . . was excluded from all financial matters related to the business, . . . and [was deprived] of any managerial and decision-making authority as a partner." *Id.* at 351.

The estate argues that Victor's exclusion of Leah during the divorce proceedings effectively took away her status as a partner. According to the record, Victor denied her any access to the business, excluded her from all financial matters, and refused to let her have any of the proceeds from the partnership.

The bankruptcy court determined that Victor's actions were not of the necessary magnitude to effect a dissolution. It cited the Pennsylvania Supreme Court case of *Potter v. Brown,* 328 Pa. 554 (1938), to support its finding. The bankruptcy court stated that *Potter* was an exception to *Herman,* reading *Potter* to hold that "the acts of a partner to preclude other partners from receiving compensation for a short time would not dissolve an otherwise successful and ongoing partnership." Bankruptcy Court's Opinion at 7.[1] After noting this "exception" to *Herman,* the bankruptcy court stated that

> to determine whether a partnership has been dissolved by exclusion of a partner, the courts appear to focus on the nature of the dispute that lead to the exclusion, the severity of the misconduct that lead to the dispute, whether the nature of the dispute was sufficiently

1. The bankruptcy court also cited *Stainton v. Tarantino,* 637 F. Supp. 1051. (E.D. Pa. 1986) as a case that "relied favorable" on *Potter.*

related to the business to impair its operations, and whether in fact operations were impaired. *Id.*

Finally, the court decided that Victor's acts to exclude Leah from the partnership were insufficient to cause a dissolution. Two reasons were cited. First, the couple's dispute was "wholly personal and unrelated to the business." *Id.* Second, because Legends was at the time being managed independently by A.W. and Sons., it was shielded from the dispute and continued to operate successfully.

The estate contends, and we agree, that the above-mentioned standards set forth by the bankruptcy court are without legal support. We also believe that the bankruptcy court erred in finding an "exception" to *Herman* under *Potter*. *Potter* involved a partnership of ten insurance professionals. Brown, the senior partner of the firm, was interested in admitting a new member, Moore, to the partnership. The other partners did not want to admit Moore because Moore was an accountant rather than an insurance professional. In order to coerce his partners, Brown passed a resolution to reduce the partners' salaries. After a short time, Brown abandoned his mission and began paying his partners their full salaries. The partners asked the court to declare a dissolution of the partnership because, based on Brown's misconduct, it was not "reasonably practicable to carry on the business with [him]." *Potter*, 328 Pa. at 560. The court found that while Brown's conduct was unprofessional and showed poor character, it did not "constitute such gross misconduct on the part of Brown . . . as to require [his] expulsion from the business." *Id.* at 561. While the court pointed out that Brown's actions did not injuriously affect the business, *id.*, the holding was based primarily on the court's characterization of the magnitude of the dispute between the partners. It stated that "'[i]t is proper to observe that it is not for every trivial departure from duty or violation of the articles of partnership, or for every trifling fault or misconduct that courts will interfere

and decree a dissolution.'" *Id.* at 562 (quoting *Story on Partnership*, § 287).

The bankruptcy court interprets *Potter* and *Stainton* to stand for the proposition that a court must decide dissolution based on the nature of the dispute between the partners and whether the dispute injuriously affects the partnership. A more precise reading of the case shows that *Potter* and *Stainton* and emphasize the magnitude and extent of the partners' actions rather than the cause of the dispute or whether or not the dispute injuriously affects business.[2] The bankruptcy court's position allows for the possibility of one partner being completely cut off by another yet not being entitled to a dissolution because the partnership's business is still carrying on successfully. We do not read *Herman* to allow for this scenario.

Leah argues that even if Victor did wrongfully expel her from the partnership in 1997, he is not entitled to a dissolution because all cases addressing dissolution by wrongful exclusion granted the dissolution to the *innocent* partner rather than the partner at fault. She further contends that whether or not she was wrongfully expelled, the estate cannot be granted an "ex post facto" dissolution, as Victor continued to operate Legends and derive profit after the alleged dissolution in 1997.

Both of Leah's arguments fail. In her first argument, Leah wrongfully assumes that a court order is needed to effect a dissolution, as all of the cases she cites include a wronged party asking for a dissolution. But dissolution in these circumstances can be effected before a court ever gets involved, and a partnership can be immediately dissolved by a wrongful exclusion. In *In re Crutcher*, 209 B.R. 347

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2. *Stainton* reaffirms the *Potter* principle by stating that "[d]issension between partners, without more, is insufficient grounds for judicial dissolution." *Stainton*, 637 F. Supp. at 1071. This language focuses on the extent of the partners' actions rather than their effect on the welfare of the business of the partnership.

(Bankr. E.D. Pa. 1997), a debtor was wrongfully expelled from a partnership on January 31, 1996. He then petitioned the court for dissolution on January 31, 1997. The court found the partnership to be dissolved as of the date of the debtor's expulsion rather than the date he formally expressed his will to dissolve the partnership by filing a dissolution petition with the court. The court determined that "[h]aving established that the Debtor was wrongfully expelled from the partnership based on events occurring before January 31, 1996, the Debtor's subsequent filing of the Proceeding is irrelevant to the date of dissolution." *Id.* at 352. If the partnership in the instant case is found to be dissolved, dissolution occurred at a time when the bankruptcy court was not even involved.

Second, a partner who wrongfully causes a dissolution may still carry on the business of the partnership. He may be liable to the wrongfully expelled partner for damages, but he can still operate the business as he did before. "[T]he partners remaining after a dissolution may continue the partnership business, irrespective of whether they caused the dissolution, although the parties acting wrongfully are obliged to indemnify the wronged partner for the value of his interest and any future partner liabilities." *Crutcher,* 209 B.R. at 353. The fact that Victor was still operating Legends does not necessarily mean that a dissolution could not have occurred.

We find that a dissolution of the partnership occurred as a result of Victor's wrongful exclusion of Leah.

*2. Court Order in 1998*

The estate alternatively argues that the partnership dissolved when Leah obtained an order from the Court of Common Pleas giving her the exclusive right to manage and derive income from the Legends. According to the estate, the order expelled Victor from the partnership much the way Victor expelled Leah in the beginning of the divorce

proceedings. The bankruptcy court found that the order did cause an exclusion:

> As to the Court-ordered exclusion of Victor from the operation of WLP, the Order does not appear to have contemplated a termination of the partnership or a fee simple conveyance of the property. Rather, it appears that the order was intended to provide Debtor with some form of support *pendente lite,* with division or distributions from the partnership ultimately to be decided in the final divorce decree or settlement. In addition, the successful operation of the Legends was unaffected by the Court's order; Debtor immediately hired a new management company to replace A.W. & Sons. There is no evidence that the partnership's profitability changed significantly thereafter.

Bankruptcy Court's Opinion at 8-9.

Again, the bankruptcy court was erroneously basing its determination of dissolution at least in part on the financial condition of the partnership after an action to exclude a partner. It was, however, also making a factual determination that Leah's purpose in seeking the order was not to exclude Victor but rather to receive income during the divorce proceedings. Leah's intentions, according to the bankruptcy court, had nothing to do with causing a dissolution of the partnership.

Whatever Leah's intentions were, her actions effectively froze Victor completely out of the partnership. The estate presented evidence, which Leah admits, that she did not give any partnership money to Victor once she took control of Legends. Even according to the bankruptcy court, Leah had the "exclusive rights to manage and derive income from the Legends." Victor, then, certainly had very little control over the business of the partnership and a great lack of voice as a partner. Based on our interpretation of the law under *Herman,* i.e. that a partner who is stripped of control over the partnership business is wrongfully excluded and

thus the partnership is dissolved, we again find that the bankruptcy court erred.

*3. Victor's Filing for Bankruptcy*

We find that the partnership was also dissolved when Victor filed for bankruptcy in June 1998. Dissolution is caused "by the bankruptcy of any partner or the partnership." 15 Pa.C.S.A. § 8353 (5). *See also Crutcher,* 209 B.R. at 352 ("[A] bankruptcy filing by a partner is a statutory cause for dissolution of a partnership."). The bankruptcy court, citing *In re Clinton Court,* 160 B.R. 57 (Bankr. E.D. Pa. 1993), found that because the partnership agreement was an executory contract, it was not affected by Victor's filing and therefore the partnership did not dissolve. Bankruptcy Court's Opinion at 9-10. *Clinton,* relying on the reasoning of *In re Rittenhouse Carpet, Inc.,* 56 B.R. 131, 132-33 (Bankr. E.D. Pa. 1985), stated that "a partnership agreement is an executory contract which cannot, pursuant to 11 U.S.C. § 365(e)(1),[3] be affected by an ipso facto clause, i.e. a provision of law or contract that a bankruptcy filing per se will terminate or modify the contract." *Clinton,* 160 B.R. at 59 (citing *Rittenhouse Carpet,* 56 B.R. at 132-33). The bankruptcy court found § 365(e)(1) to control and § 8353 (5) to be a *provision of law* that does not apply in light of the federal bankruptcy statute.

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3. 11 U.S.C. § 365(e)(1) states:

> (e)(1) Notwithstanding a provision in an executory contract or unexpired lease, *or in applicable law,* an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such conract or lease that is conditioned on
>
> (A) the insolvency or financial condition of the debtor any time before the closing of the case;
>
> (B) the commencement of a case under this title; or
>
> (C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement . . .

*Id.*

What the bankruptcy court does not address, however, is that in both *Clinton* and *Rittenhouse Carpet,* the issue was whether the partnership itself could file for bankruptcy after one of its partners filed individually. All the two cases held was that the bankruptcy filing by a partner should not preclude the filing by the partnership as a whole. In this case, the partnership is not a debtor, so § 365(e)(1) does not apply. Our case is more analogous to *Crutcher* than to *Clinton* or *Rittenhouse Carpet,* as the debtor in *Crutcher* was an individual partner rather than the partnership as a whole. Chief Bankruptcy Judge David A. Scholl, the author of *Clinton,* who also wrote *Crutcher,* notes the distinction in a footnote in *Crutcher:*

> While this court held, in *In re Clinton Court* . . . that a bankruptcy filing by a partner should not preclude a partnership from filing a bankruptcy case, on the grounds that this result would violate 11 U.S.C. § 365(e)(1), the partnership is not a debtor here. Thus, § 365(e)(1) does not come into play. It therefore appears that . . . the partnership would necessarily have to be held to have been dissolved as of [the date the partner filed individually for bankruptcy].

*Crutcher* 209 B.R. 347, n. 2. The partnership is not a debtor in this case either; therefore § 365(e)(1) does not apply and Leah's argument fails. We find that as a result of Victor's bankruptcy petition, the partnership was dissolved on June 20, 1998 at the latest.

## B. Leah's Exercise Of Her Option to Purchase Victor's Interest

In their briefs, the parties vigorously dispute whether Leah properly exercised her option to purchase Victor's interest under the partnership agreement. They argue over terms in the agreement such as "net book value" and "regular accounting," and they write extensively about the credibility of witnesses who testified at trial. We find it

unnecessary to address the technical aspects of Leah's purchase because it is clear to us that she took no steps to exercise her option upon the dissolution of the partnership. Paragraph XVII of the agreement states that upon dissolution of the partnership, the remaining partner may continue the business of the partnership on 30 days' written notice to the other partner. Sicne we find that the partnership dissolved in June 1998 at the latest, we must also find that Leah did not exercise here option in time, as she took no steps to purchase Victor's interest until after his death in 1999.

Because the partnership was dissolved prior to Victor's death, his estate is entitled to settle the accounts of the partnership pursuant to 59 Pa.C.S. § 8362.

**Conclusion**

For the above-mentioned reasons, the order of the bankruptcy court will be reversed. We find that the bankruptcy court erred in allowing Leah to buy Victor's interest in the partnership after he died. The partnership was dissolved no later than 1998 when Victor filed for bankruptcy, and Leah did not exercise her option to purchase the interest within 30 days of the dissolution.

The case will be remanded to the bankruptcy court for further proceedings consistent with this memorandum.

/s/ James F. McClure, Jr.

James F. McClure, Jr.
United States District Judge

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

| | | |
|---|---|---|
| In re: | : | |
| LEAH BETH WOSKOB | : | Bnkr. No. 1-99-02600 |
| | : | |
| *Debtor* | : | |

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|---|---|---|
| ESTATE OF VICTOR WOSKOB | : | Adv. No. 1-99-00219A |
| and ALEX AND HELEN WOSKOB, | : | No. 4:00-CV-00-1265 |
| | : | |
| *Plaintiffs/Appellants* | : | |
| | : | |
| *v.* | : | (Judge McClure) |
| | : | |
| LEAH BETH WOSKOB, | : | |
| | : | |
| *Defendant/Appellee* | : | |

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|---|---|---|
| LEAH BETH WOSKOB, | : | Adv. No. 1-99-00220A |
| | : | No. 4:00-CV-00-1264 |
| *Plaintiff/Appellee* | : | |
| *v.* | : | |
| | : | (Judge McClure) |
| ALEX WOSKOB and HELEN WOSKOB, | : | |
| EXECUTORS OF THE ESTATE OF | : | |
| VICTOR M. WOSKOB, | : | |
| | : | |
| *Defendants/Appellants* | : | |

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## ORDER

February 6, 2001

For the reasons set forth in the accompanying memorandum,

**IT IS ORDERED THAT:**

1. The two orders entered on June 14, 2000 by the bankruptcy court in favor of Leah Beth Woskob are reversed.

2. The two cases are remanded to the bankruptcy court for further proceedings consistent with the accompanying memoradum.

/s/ James F. McClure, Jr.

James F. McClure, Jr.
United States District Judge

# APPENDIX D

**UNITED STATES BANKRUPTCY COURT**
**MIDDLE DISTRICT OF PENNSYLVANIA**

| | | |
|---|---|---|
| In re: | : | |
| LEAH BETH WOSKOB, | : | |
| *Debtor* | : | |
| | : | Case No. 1-99-02600 |

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| | | |
|---|---|---|
| ESTATE OF VICTOR WOSKOB and | : | |
| ALEX WOSKOB and HELEN WOSKOB, | : | |
| | : | |
| *Plaintiffs* | : | |
| | : | CHAPTER 11 |
| *v.* | : | |
| | : | Adv. No. 1-99-00219A |
| | : | |
| LEAH BETH WOSKOB, | : | |
| | : | |
| *Defendant* | : | (Action to compel an |
| | : | accounting and to |
| | : | appoint a receiver) |

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| | | |
|---|---|---|
| LEAH BETH WOSKOB, | : | |
| | : | |
| *Plaintiff* | : | |
| | : | |
| *v.* | : | |
| | : | Adv. No. 1-99-00220A |
| | : | |
| ALEX WOSKOB and HELEN WOSKOB, | : | |
| EXECUTORS OF THE ESTATE OF | : | |
| VICTOR M. WOSKOB, | : | |
| | : | |
| *Defendants* | : | (Action for declaratory |
| | : | judgment to permit |
| | : | purchase of partnership) |

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**ORDER**

AND NOW, this 14th day of June, 2000, judgment is hereby granted in favor of Leah Beth Woskob, on her action for a declaratory judgment as to her ability to purchase the Woskobs Legends Partnership as the surviving partner pursuant to her Agreement with Victor Woskob. The request of Alex and Helen Woskob and the estate of Victor Woskob for an accounting is hereby denied.

BY THE COURT,

/s/ Robert J. Woodside

ROBERT J. WOODSIDE
CHIEF BANKRUPTCY JUDGE

HARRISBURG, PENNSYLVANIA

**UNITED STATES BANKRUPTCY COURT**
**MIDDLE DISTRICT OF PENNSYLVANIA**

| | | |
|---|---|---|
| In re: LEAH BETH WOSKOB, | : | |
| | : | |
| *Debtor* | : | |
| | : | Case No. 1-99-02600 |

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| | | |
|---|---|---|
| ESTATE OF VICTOR WOSKOB and ALEX WOSKOB and HELEN WOSKOB, | : | |
| | : | |
| *Plaintiffs* | : | |
| | : | CHAPTER 11 |
| *v.* | : | |
| | : | Adv. No. 1-99-00219A |
| LEAH BETH WOSKOB, | : | |
| | : | |
| *Defendant* | : | (Action to compel an accounting and to appoint a receiver) |

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| | | |
|---|---|---|
| LEAH BETH WOSKOB, | : | |
| | : | |
| *Plaintiff* | : | |
| *v.* | : | |
| | : | Adv. No. 1-99-00220A |
| ALEX WOSKOB and HELEN WOSKOB, EXECUTORS OF THE ESTATE OF VICTOR M. WOSKOB, | : | |
| | : | |
| *Defendants* | : | (Action for declaratory judgment to permit purchase of partnership) |

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# MEMORANDUM

## Factual and Procedural History

Before me is the case of a debtor who has an interest in a real estate partnership and who wishes to exercise a contract option to allow her to purchase the partnership from her former partner. The estate of the former partner opposes such purchase and seeks to compel the debtor to provide an accounting of the partnership's business, and to have a receiver named to wind up the affairs of the partnership. The specific facts are as follows.

Leah Woskob (Debtor) and Victor Woskob (Victor) formed the Woskob Legends Partnership (WLP) in 1996 for purposes of obtaining a multi-million dollar loan with which to construct the Legends Apartments (Legends) in State College, Pennsylvania. Debtor and Victor were equal partners under the Partnership Agreement (Agreement). Upon dissolution of the partnership by an act of the partners or by death, the Agreement allowed the remaining or surviving partner to purchase the interest of the lost partner by payment of a sum to be calculated by a certain formula.

After the Legends was built, it was managed by A.W. & Sons, which was owned by Victor's parents, Alex and Helen Woskob (Woskobs).

In January, 1997, Debtor and Victor separated, and Debtor filed for divorce shortly thereafter. In the acrimony thereof, Victor prevented Debtor from receiving any distributions from WLP. However, it was Victor who was later excluded from such funds when the state divorce court granted Debtor exclusive rights to manage and derive income from the Legends. On June 20, 1997, control of the Legends was formally turned over to the Debtor.

In June, 1998, Victor filed a bankruptcy Petition in this Court. Therein, he listed as an asset a 50% interest in WLP. Victor voluntarily withdrew his Petition on March 10, 1998.

In January, 1999, Victor was killed in a tragic accident. The Woskobs were appointed as executors of his estate according to his will. On January 27, 1999, Debtor notified the Woskobs of her intention to dissolve WLP, and to purchase Victor's interest pursuant to the relevant terms of the Agreement, which were as follows:

> XVII. On dissolution of the Partnership by the withdrawal or other act of a Partner, the remaining Partner, on written notice to the other Partner, within thirty (30) days of the dissolution, may continue the Partnership business by purchasing the interest of the other Partner in the assets and goodwill of the Partnership.
>
> XVIII. On exercise of the option described in Paragraph 17, above, the remaining Partner shall pay to the person who is legally entitled to it the net book value of the interest as shown on the last regular accounting of the Partnership preceding the dissolution together with the full unwithdrawn portion of the deceased, withdrawing, or terminated Partner's distributive share of any net profits earned . . . between the date of the accounting and the date of dissolution. . . .
>
> XIX. The surviving Partner has the option to dissolve the Partnership on the death of a Partner. The surviving Partner shall have the right within ninety (90) days from the date of death . . . to purchase the interest of the deceased Partner . . . and to pay the personal representative of the deceased Partner the value of that interest as provided in Paragraph 18 of this Agreement. . . . The estate of the deceased Partner shall be obligated to sell his or her Partnership interest as provided in this Agreement. . . . If the surviving Partner does not elect to purchase the interest of the deceased Partner, the Partnership shall terminate.

The Woskobs opposed the sale of WLP to the Debtor. They contended that the partnership had been previously dissolved when each party was by turns excluded from its

proceeds, or when Victor filed his bankruptcy Petition. Therefore, the Woskobs sued in state court for an accounting of WLP's business and to have a receiver appointed to sell its assets. Debtor, in turn, sought a declaratory judgment that she was the sole owner of WLP. After Debtor filed the instant bankruptcy Petition in June, 1999, these state court actions were removed to this Court and were tried jointly.

Briefs have been filed, and all matters are now ripe for decision. I have jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334. These matters are core pursuant to 28 U.S.C. § 157 (b) (2) (A), (E) and (0).

**Discussion**

The issue before me is whether WLP was dissolved prior to Victor's death, thereby rendering untimely Debtor's declaration of her intent to purchase his interest.

The Woskobs argue that, under paragraph XVII of the Agreement, WLP was terminated as a partnership by an "act of a partner"; to wit, either (1) Victor's preventing Debtor from collecting distributions after the marital separation, or (2) the divorce court's granting of the Debtor's motion that full management and income control should be handed over to her. The Woskobs further argue that Pennsylvania's Uniform Partnership Act (UPA) dictates that the partnership be considered to have dissolved during the divorce.

UPA contains the following provisions regarding dissolution of a partnership.

> The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on, as distinguished from the winding up, of the business.

15 Pa.C.S.A. § 8351.

Dissolution is caused:

(1)(iv) By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners.

* * *

(2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time.

* * *

(4) By the death of any partner.

* * *

(5) By the bankruptcy of any partner or the partnership.

15 Pa.C.S.A. § 8353.

The Agreement in this case conferred no power on either partner to expel the other, and so § 8353(i)(iv) on its face is inapplicable. However, Pennsylvania courts have historically held that "[t]he exclusion of one partner by another from the management of the partnership business or possession of the partnership property is undoubtedly ground for dissolution by a court of equity." *Herman v. Pepper*, 311 Pa. 104, 166 A. 587 (1933) (citing cases). Much of the Woskobs' case relies on *Herman*. In *Herman*, the Plaintiff had entered into a partnership agreement to build and operate apartments. Plaintiff later borrowed money from a third party, Pepper, and in return assigned his interest in the apartments, executing a deed absolute in conjunction with the assignment. Pepper, in turn, executed a promise to reconvey the property to Plaintiff under certain conditions involving repayment of the loan. A few years later, the mortgagee of the building notified the partners that it would no longer carry the mortgage unless, among other things, the partnership stopped paying Plaintiff a

salary. Consequently, the partnership refused to allow Plaintiff to draw his salary, taking the position that the assignment and deed were absolute, and that Plaintiff was therefore no longer a partner.

The Court considered whether the Plaintiff had established a right to dissolution of the partnership by his evidence that he had been precluded from receiving his salary.[1] The Court reasoned that "each member of a partnership, in the absence of an agreement to the contrary, has the right to share in the management of the firm affairs and to participate in the profits, and a refusal of one or both of these rights is sufficient to warrant a decree of dissolution of the partnership and the appointment of a receiver." *Id.*, at 588.

In a later case, *Potter v. Brown, 328 Pa. 554, 195 A. 901 (1938)*, the Court noted an exception to its prior ruling in *Herman*. It held that the acts of a partner to preclude other partners from receiving compensation for a short time would not dissolve an otherwise successful and ongoing partnership. The court stated that the case was "ruled by the principle . . . that is it not for every . . . trifling fault or misconduct that courts of equity will interfere and decree a dissolution." *Id., at 562 (citations omitted)*. Later cases in the Federal Courts have relied favorably on Potter. *See, Stainton v. Tarantino, 637 F.Supp. 1051 (E.D. Pa. 1986)* (animosity between partners did not injuriously affect business and therefore court would not declare partnership dissolved.)

Thus, to determine whether a partnership has been dissolved by exclusion of a partner, the courts appear to focus on the nature of the dispute that lead to the exclusion, the severity of the misconduct that lead to the dispute, whether the nature of the dispute was sufficiently related to

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1. At the outset of its discussion, the Court held that the assignment was not an absolute conveyance, but only a mortgage.

the business to impair its operations, and whether in fact operations were impaired.

Applying that focus to the instant facts reveals that Victor's exclusion of Debtor from receiving distributions did not effect a dissolution. The nature of the partners' dispute was wholly personal and unrelated to the business. The business was being operated not by the partnership but by an entirely separate entity, A.W. & Sons, thus shielding it from harm from the partners'-dispute. The business was successfully operated during the period in which Debtor was excluded from participation. Under the principles espoused in Potter and repeated in *Tarantino,* the instant partnership cannot be found to have dissolved simply based on the partners' divorce-related dispute.

Moreover, it appears to me that Debtor's divorce petition would have placed all of the couple's assets, obviously including WLP, within the control of the divorce court. "When [a party] initiate[s] [a] divorce action, all marital property [is] placed under the trial court's jurisdiction. As such, the property [is] in custodia legis, or under wardship of the court, pending the outcome of the divorce proceeding." *Fidelity Bank v. Carroll, 416 Pa.Super. 9, 13, 610 A.2d 481, 483 (1992), aff'd, 539 Pa. 276, 652 A.2d 296 (1994).* Thus, in fact, Victor's acts to exclude Debtor from participation in the partnership were without effect in law, because Victor no longer had legal control of the partnership once it became *in custodia legis.* It also appears to me that to allow a partnership to be dissolved simply by an act of one partner to exclude the other would be to give one partner the power to dissolve a business without such power having been conferred by an agreement between the partners.

As to the Court-ordered exclusion of Victor from the operations of WLP, the Order does not appear to have contemplated a termination of the partnership or a fee simple conveyance of the property. Rather, it appears that the order was intended to provide Debtor with some form of

support *pendente lite*, with division or distributions from the partnership ultimately to be decided in the final divorce decree or settlement. In addition, the successful operation of the Legends was unaffected by the Court's order; Debtor immediately hired a new management company to replace A.W. & Sons. There is no evidence that the partnership's profitability changed significantly thereafter.

The Woskobs next cite 15 Pa.C.S.A. § 8353(5) to argue that dissolution occurred when Victor filed his Bankruptcy Petition. I reject this argument as well. "All of the pertinent cases appear to agree that a partnership agreement is an executory contract unless it has been terminated by a state court decree on grounds other than those related to a partner's bankruptcy filing." *In re Clinton,* 160 B.R. 57, 60 (Bankr.E.D.Pa. 1993). Thus, in *Clinton*, the Court held that a partner's bankruptcy filing had not dissolved the partnership, despite the state statute. The Court found that a partnership agreement is in fact an executory contract, and thus that its continued existence post-bankruptcy is not governed by state law, but rather by 11 U.S.C. § 365(e)(1), which states as follows: "Notwithstanding a provision in an executory contract . . . *or in applicable law*, an executory contract . . . of the debtor may not be terminated . . . at any time after the commencement of the case solely because of . . . the commencement of a case under this title." *(Emphasis added.)*

Similarly, the instant Agreement was an executory contract at the time Victor filed his Petition. It was not rejected in the course of the administration of that case; in fact that case was dismissed. Therefore, under § 365(e)(1), Victor's Petition did not act to apply the state statute to the WLP partnership, and thereby terminate it.

The Woskobs next argue that certain ambiguities in the Agreement preclude it from controlling the terms of dissolution. Their argument focuses on the sums which the surviving party is required to pay for the lost party's share. They assert that for a real estate partnership, the Agreement's terms would almost inevitably render that sum a negative amount.[2] Specifically, the Woskobs point to the terms which call for the deceased partner's estate to be paid a sum based on the "net worth" of the property. They define "net worth" as the total assets minus total liabilities. Thus, they argue, as indicated in footnote 2, the net worth of WLP would always be negative. This, the Woskobs conclude, would render the Agreement's terms absurd because it would effectively mean that at Victor's death, his estate would *owe Debtor money* rather than vice versa. Again, this argument must be rejected.

The fact of the matter is that the Partnership Agreement was entered into at a time when the Debtor and Victor were happily married and their interests for the future and their children were one and the same. At that time, neither party was concerned with how much the survivor would have to pay for the partnership, because the survivor would use the partnership for the same purpose that the deceased partner would have used it: for the support of the survivor and the children. The Woskob's argument assumes an arms-length business transaction, but that was simply not the kind of transaction that took place here. Therefore, the fact that the language of the Agreement may have created a situation where the asset would transfer without consideration is of no moment. Such is generally the case in closely held or intra-family partnerships when the partner's interests are identical.

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2. In cases of real estate partnership where, as here, the partners take 100% of distributions as they become available, the assets of the partnership never increase. Thus the "net" assets decrease because the property's value is depreciating each year at a pace more rapid than the amount of the mortgage debt.

For these reasons, I conclude that the partnership was not dissolved prior to Victor's death. Clearly, though, under Pennsylvania law, it was dissolved when he died. In accordance with the Agreement, Debtor duly notified his executors of her intent to purchase his share of the business. Her intent is entitled to enforcement. A declaratory judgement will therefore be entered in her favor.

As to their request for an accounting, the Woskobs presented no evidence of mismanagement of the partnership which would suggest the need for an accounting. The focus of their case was simply on the dissolution of the partnership. Therefore, the requests by the Woskobs for an accounting and for the appointment of a receiver will be denied.

An appropriate order follows.

BY THE COURT,

/s/ Robert J. Woodside

ROBERT J. WOODSIDE
CHIEF BANKRUPTCY JUDGE

HARRISBURG, PENNSYLVANIA